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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 250

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

NEW WRINKLE, INC., AND THE KAY & ESS COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

FILED AUGUST 17, 1951.

PROBABLE JURISDICTION NOTED OCTOBER 8, 1951.

SUPREME COURT OF THE UNITED STATES

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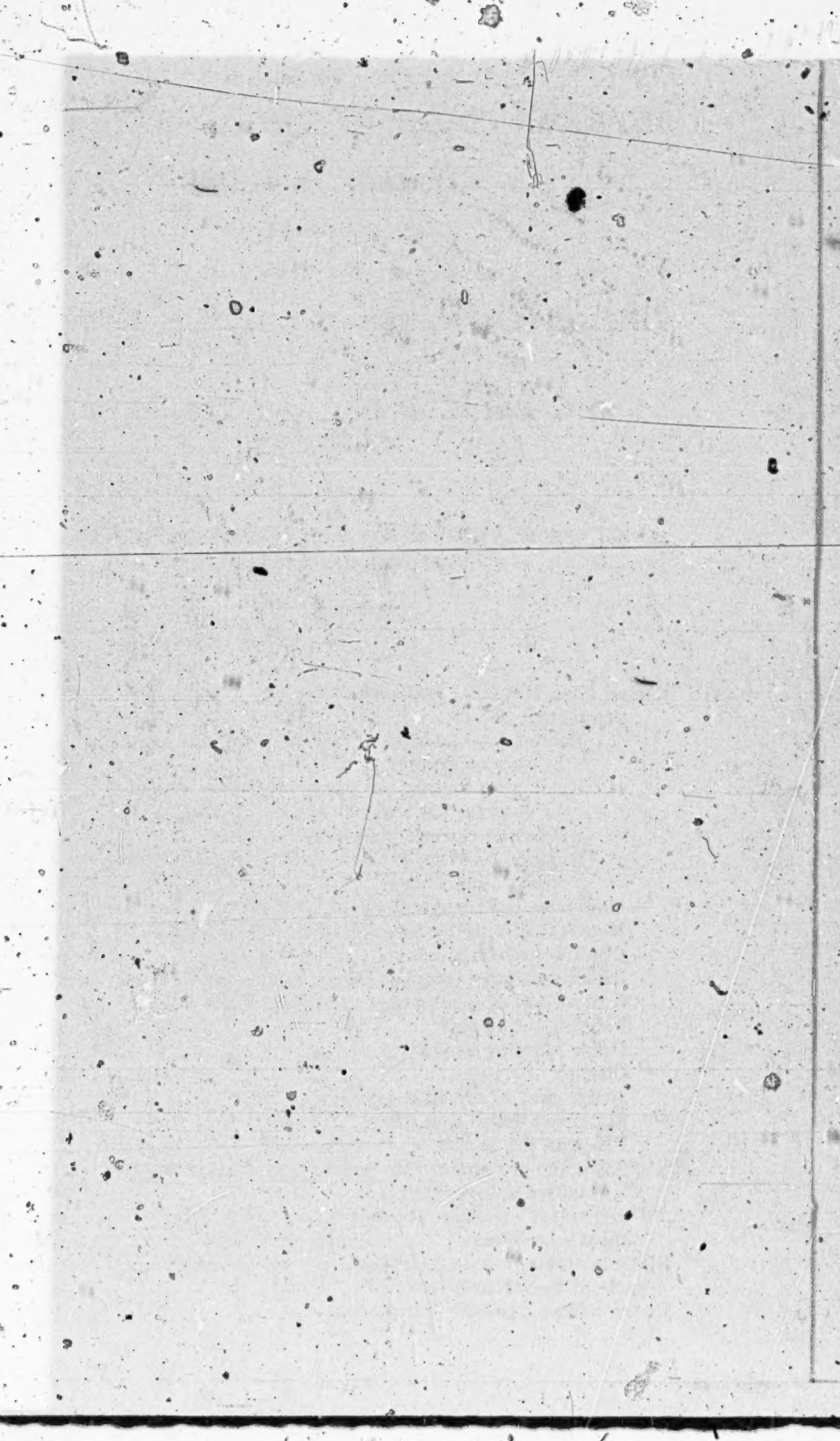

1 [File endorsement omitted]

In United States District Court for the Southern District of Ohio

Civil Action No. 2278

UNITED STATES OF AMERICA, PLAINTIFF

v.

NEW WRINKLE, INC. AND THE KAY & ESS COMPANY, DEFENDANTS

COMPLAINT—Filed September 21, 1948

The United States of America, by its attorneys, acting under the direction of the Attorney General, brings this action against the defendants and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed and this action is instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Act," in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of said Act.

2. Each of the defendants transacts business within the Southern District of Ohio and is found therein.

II

The Defendants and Co-Conspirators

Defendants

3. New Wrinkle, Inc., hereinafter referred to as New Wrinkle, a corporation organized and existing under the laws of the State of Delaware, with its principal offices at Dayton, Ohio, is made a defendant herein.

2 4. Kay & Ess Company, hereinafter referred to as K & S, a corporation organized and existing under the laws of Ohio, with its principal offices at Dayton, Ohio, is made a defendant herein.

Co-Conspirators

5. Chadeloid Chemical Company, hereinafter referred to as Chadeloid, a corporation organized under the laws of West Virginia, is not made a defendant, but is named a co-conspirator herein.

Chadeloid was dissolved in or about the year 1945 and its assets distributed among its stockholders.

6. The manufacturing concerns listed on Exhibit A attached to this complaint are not made defendants, but are named co-conspirators herein. Each is, or has been during the period covered by this complaint, a licensee under the wrinkle finish patent rights owned or controlled by New Wrinkle, Inc., and each is, or has been during that period, engaged in manufacturing and selling wrinkle finishes, as defined below.

7. Certain individuals from time to time associated with or acting on behalf of one or more of the defendants or co-conspirators have also acted as co-conspirators in the offenses charged herein.

III

Nature of the Trade and Commerce Involved.

8. "Wrinkle" finishes, also known as "Crinkle," "Shrivel," "Sag," "Morocco," and by other designations, are defined as enamels, varnishes and paints which have been compounded from such materials and by such methods as to produce when applied and dried, a hard wrinkled surface on metal or other material.

9. Wrinkle finishes are widely used as coverings for the surfaces of typewriters, cash registers, motors, adding machines, and many other articles of manufacture. They have the following advantages over smooth finishes such as ordinary enamels and varnishes:

a. One coat of wrinkle finish is sufficient for many purposes for which two or more coats of smooth finish would be required;

b. Surfaces to which wrinkle finishes are to be applied need not be prepared as carefully as those which are to receive smooth finishes, since the wrinkle finishes cover small imperfections; and

c. The original appearance of wrinkle-finished articles can be maintained with less cleaning and polishing than that of smooth-finished articles.

10. Wrinkle finishes are being produced and sold in the United States at the rate of approximately one million gallons per year and the manufacturers thereof receive in excess of two million dollars per year for these products.

11. New Wrinkle has not engaged in the commercial manufacture and sale of wrinkle finishes at any time since its incorporation in 1937. However, it owns or controls patents relating to wrinkle finishes, and since 1938, has licensed and now licenses in excess of 200 manufacturing concerns to make, use, and sell wrinkle finishes under those patents.

12. Substantially all wrinkle finishes produced in the United States are manufactured by these licensees, whose places of business are located in principal cities throughout the various states. A substantial portion of the wrinkle finishes made by licensees is sold to purchasers in states other than those in which the finishes are manufactured and to purchasers in the Dominion of Canada, and is shipped from one state to another, and from various states of the United States to various locations in the Dominion of Canada in the ordinary course of business.

IV

Offenses Charged

13. For many years, the defendants and co-conspirators have been continuously and are now engaged in an unlawful combination and conspiracy, and have been continuously and are now parties to unlawful contracts, in restraint of trade and commerce in wrinkle finishes among the several states of the United States and between various states of the United States and the Dominion of Canada, all in violation of Section 1 of the Sherman Act. The defendants and co-conspirators are continuing, and threaten to and will continue said offenses unless the relief hereinafter prayed for in this complaint is granted. The aforesaid combination and conspiracy, and certain of the contracts, agreements, arrangements and understandings which formed a part and were used in effectuation thereof will be hereinafter more fully set forth and described.

14. In 1937, and for some time prior thereto, K & S and Chadeloid had been engaged in litigation with respect to various patents on wrinkle finishes. Chadeloid held certain patents which it alleged were basic; K & S held other patents which it alleged provided for more economical and efficient means of producing wrinkle finishes, but which Chadeloid contended were subservient to the basic patents held by Chadeloid.

15. During 1937 representatives of K & S and Chadeloid negotiated with each other with a view toward effecting a pooling of the patents of the two corporations in order to eliminate competition between them and to set up a licensing system under which prices for the entire wrinkle finish industry would be fixed.

16. As a result of these negotiations, on or about November 2, 1937, K & S and Chadeloid entered into a contract providing for the formation of a new company to be known as New Wrinkle, Inc., to which K & S and Chadeloid each agreed to assign all of its patent rights relating to wrinkle finishes in return for common and preferred stock in the new corporation. The contract further provided that non-exclusive licenses under all the wrinkle finish patent rights

previously held by K & S and Chadeloid would be granted by New Wrinkle to Chadeloid, K & S, and other manufacturers of wrinkle finishes, and that minimum prices at which all licensed manufacturers might sell would be fixed by New Wrinkle. Attached to the contract was a list of the principal companies then engaged in the manufacture and sale of wrinkle finishes and it was expressly agreed that the price schedules would not be made effective until the Sherwin-Williams Company, a corporation of Ohio with its general office at Cleveland, Ohio, and any eleven of the other companies on the list had signed the contract and agreed to follow the minimum prices. A copy of the list is attached to and made a part of this complaint as Exhibit B.

17. After the formation of New Wrinkle, and the transfer to it of the patent rights previously held by K & S and Chadeloid, provided for in the aforesaid contract of November 2, 1937, the new corporation caused its stock to be issued on the following basis:

To K & S: 150 shares of preferred and 51% of the common stock.

To Chadeloid and its nominee: 400 shares of the preferred, and 49% of the common stock.

18. After the execution of the aforesaid contract, representatives of K & S and of Chadeloid worked together and with representatives of certain of the companies named as co-conspirators to induce the other companies in the industry to accept licenses from New Wrinkle in order that competitive practices deemed by them to be undesirable might be eliminated. Prospective licensees were advised that other prospective licensees had been and were being consulted in order to establish minimum prices throughout the industry.

19. Meetings were held between representatives of K & S and Chadeloid and of certain of the co-conspirators at which terms of the license agreements were agreed upon, and prices, terms, and conditions of sale were discussed. Licenses were then executed between New Wrinkle and certain of the con-conspirators; but as provided in the contract of November 2, 1937, price schedules were not put into effect until the Sherwin-Williams Company and eleven other of the specified companies listed in the contract had agreed to accept such licenses. On or about May 7, 1938, the required number of manufacturing companies having signed such agreements, the price schedules were made effective.

20. The license agreements between New Wrinkle and defendant K & S and between New Wrinkle and the other licensed manufacturers of wrinkle finish provide, among other things, that:

a. Each licensee is licensed under New Wrinkle patents to make, use and sell wrinkle finishes;

b. Each licensee, in its sales of wrinkle finishes, is required to sell such finishes at not less than the minimum prices and discounts and on selling terms no more favorable than those established and to be established by New Wrinkle, except when selling to other licensees;

c. Each licensee agrees to pay a royalty of five cents per gallon on wrinkle finishes which it sells or uses;

d. Prices, terms and conditions of sale may be changed by New Wrinkle on 30 days' notice to each licensee and each licensee may cancel the agreement by giving written notice at any time during this 30-day period.

21. From time to time after May 7, 1938, knowing that concerted action among the defendants and co-conspirators was contemplated and required in order to carry out and maintain the aforesaid illegal combination and conspiracy of the aforesaid illegal contracts, other companies accepted licenses containing provisions similar to those described in paragraph 20 above. All of the license agreements are substantially identical. A copy of one of such agreements is attached to and made a part of this complaint as Exhibit C.

7 22. New Wrinkle, with the advice and consent of its licensees, from time to time has issued to all of such licensees schedules of minimum prices, terms and conditions of sale to be followed by each licensee in its sales of wrinkle finishes. Each licensee thereafter adhered to the minimum prices, terms and conditions of sale set forth in those schedules. A copy of the schedule in effect at the present time is attached to and made a part of this complaint as Exhibit D.

V

Effect of the Combination and Conspiracy and the Contracts

23. The combination and conspiracy and the contracts, and the acts done in effectuation thereof, hereinabove described, have had the effect, as intended by the defendants and co-conspirators, of fixing and maintaining identical and unreasonably high and arbitrary minimum prices, discounts and selling conditions and terms for substantially all wrinkle finishes manufactured and sold in the United States, and of eliminating competition between the defendants and co-conspirators in the sale of such finishes.

Relief

WHEREFORE, plaintiff demands:

(1) That the aforesaid combination and conspiracy and contracts be adjudged and decreed to be unlawful and in violation of Section 1 of the Sherman Act.

(2) That the aforesaid contracts and license agreements between the defendants and between the defendants, or either of them, and one or more of the co-conspirators, be declared to be illegal and be ordered terminated and cancelled.

(3) That the defendants and their officers, directors, agents,
8 representatives, successors, assigns, and all persons and corporations acting on behalf of them or either of them be perpetually enjoined from combining, conspiring or agreeing to restrain trade and commerce in wrinkle finishes among the several states of the United States and with foreign nations, and that they be perpetually enjoined from engaging in or participating in practices, contracts, relationships or understandings, or claiming any rights thereunder, having the purpose or effect of continuing, reviving or renewing any of the aforesaid violations of the Sherman Act.

(4) That the Court adjudge and decree that the defendants have used their patent rights unlawfully in instituting, effectuating, and maintaining the aforesaid combination and conspiracy and the aforesaid unlawful contracts, and enter such orders relating to any and all of their patent rights as the Court may deem appropriate and necessary to dissipate the effects of the unlawful combination and conspiracy, contracts and activities herein alleged, and to establish free and unfettered competition in the trade and commerce herein described.

(5) That the plaintiff have such further, general and different relief as the nature of the case may require and the Court may deem proper in the premises.

(S.) ROBERT A. NITSCHKE,
Special Assistant to the Attorney General.

(S.) JOHN S. JAMES,
(S.) FRANK W. GAINES, JR.,
Special Attorneys.

(S.) TOM C. CLARK,
Attorney General.

(S.) HERBERT A. BERGSON,
Assistant Attorney General.

(S.) GEORGE L. DERR,
Special Attorney.

(S.) RAY J. O'DONNELL,
United States Attorney.

9 EXHIBIT "A"—TO COMPLAINT

Manufacturing Concerns, Location

Acme White Lead & Color Works, Detroit, Michigan.
The Advance Paint Company, Indianapolis, Indiana.
Akron Paint & Varnish Co., Akron, Ohio.
Aktiebolaget Wilh. Becker, Stockholm, Sweden.
Allied Finishing Specialties Co., Chicago, Illinois.
Alston-Lucas Paint Company, Chicago, Illinois.
American-Marietta Company, Chicago, Illinois.
American Paint Company, Chicago, Illinois.
The Anglo-American Varnish Co., Newark, New Jersey.
The Arco Company, Cleveland, Ohio.
Arco Company of California, Ltd., Los Angeles, California.
Atlas Powder Company, Wilmington, Delaware.
Baer Brothers, New York, New York.
Baltimore Paint & Color Works, Inc., Baltimore, Maryland.
Barrett Varnish Co., Cicero, Illinois.
R. A. Becker Paint & Varnish Co., Cincinnati, Ohio.
Berry Brothers, Inc., Detroit, Michigan.
Better Finishes & Coatings, Inc., Newark, New Jersey.
Bigelow Varnish Co., Newark, New Jersey.
Boston Varnish Company, Everett, Massachusetts.
The Boydell Bros. Company, Detroit, Michigan.
Braddock Paint & Glass Co., Braddock, Pennsylvania.
Bradley & Vrooman Co., Chicago, Illinois.
Bradley Wise Paint Company, Los Angeles, California.
Breinig Bros. Inc., Hoboken, New Jersey.
Brimstool Paint Company, Los Angeles, California.
Andrew Brown Co., Los Angeles, California.
John L. Armitage & Company, Newark, New Jersey.
The Burdsal Co., Indianapolis, Indiana.
A. C. Buschman & Co., Inc., Newark, New Jersey.
California Paint Company, San Francisco, California.
10 Capitol Chemical Co., Chicago, Illinois.
John G. Carlsen & Company, Chicago, Illinois.
Chemical and Pigment Co., Inc., Cleveland, Ohio.
Chemical Coatings Corp., Rocky Hill, Connecticut.
The Cincinnati Varnish Co., Inc., Cincinnati, Ohio.
Cleveland Paint and Color Co., Cleveland, Ohio.
The Clinton Co., Chicago, Illinois.
Clover Leaf Paint & Varnish Co., Long Island City, New York.
Coatings Materials Lab. Inc., Bellevue, New Jersey.
The Columbus Varnish Co., Inc., Columbus, Ohio.
Con-Ferro Paint & Varnish Co., St. Louis, Missouri.
Cook Paint & Varnish Co., Kansas City, Missouri.

Manufacturing Concerns, Location

Crescent Ink & Color Co. of Pa., Philadelphia, Pennsylvania.
Don V. Davis Company, St. Louis, Missouri.
De Sota Paint & Varnish Co., Memphis, Tennessee.
Detroit Graphite Co., Detroit, Michigan.
Devoe & Reynolds Co., Inc., New York, New York.
Dibble Color Company, Detroit, Michigan.
V. J. Dolan & Co., Inc., Chicago, Illinois.
The F. J. Donahue Varnish Co., Detroit, Michigan.
Drexel Finishes Co., Philadelphia, Pennsylvania.
Duralac Chemical Company, Newark, New Jersey.
Eagle Paint & Varnish Works, Pittsburgh, Pennsylvania.
Eastern States Paint & Varnish Co., Philadelphia, Pennsylvania.
Egyptian Lacquer Mfg. Co., Inc., South Kearney, New Jersey.
Enterprise Paint Mfg. Co., Chicago, Illinois.
The Farboil Paint Company, Baltimore, Maryland
Felton, Sibley & Co., Inc., Philadelphia, Pennsylvania.
11 The Ferbert-Schorndorfer Co., Cleveland, Ohio.
Leon Finch, Ltd., Los Angeles, California.
Flint Paint and Glass Co., Flint, Michigan.
Flood & Conklin Company, Newark, New Jersey.
Forman, Ford & Company, Minneapolis, Minnesota.
The Foy Paint Company, Cincinnati, Ohio.
D. C. Franche & Co., Chicago, Illinois.
Benj. Franklin Paint & Varnish Co., Philadelphia, Pennsylvania.
Frost Paint & Oil Corp., Minneapolis, Minnesota.
W. P. Fuller Company, San Francisco, California.
General Finishes, Inc., Minneapolis, Minnesota.
General Paint Corporation, San Francisco, California.
P. D. George Company, St. Louis, Missouri.
The Glidden Company, Cleveland, Ohio.
Grand Rapids Varnish Corp., Grand Rapids, Michigan.
C. W. Haynes Laboratories, Inc., Springfield, Massachusetts.
Hilo Varnish Corp., Brooklyn, New York.
Homestead Paint and Glass Co., Homestead, Pennsylvania.
A. C. Horn Co., Inc., Long Island City, New York.
Illinois Paint Works, Chicago, Illinois.
Impervious Varnish Co., Rochester, New York.
India Paint & Lacquer Co., Los Angeles, California.
Indianapolis Paint & Color Co., Indianapolis, Indiana.
Indianapolis Varnish Co., Inc., Indianapolis, Indiana.
Interchemical Corp., Finishes Div., New York, New York.
Inter-Coastal Paint Co., Baltimore, Maryland.
Jamestown Finishing Products Inc., Jamestown, New York.
Jamestown Paint & Varnish Co., Jamestown, Pennsylvania.
Jewel Paint & Varnish Co., Chicago, Illinois.

Manufacturing Concerns, Location

John Lucas & Company, Inc., Philadelphia, Pennsylvania.
R. F. Johnson Paint Co., Cincinnati, Ohio.
12 Jones-Dabney Co., Louisville, Kentucky.
Jones & Dillingham Co., Spokane, Washington.
Kellerman Paint Company, New York, New York.
Lacquer & Chemical Corp., Brooklyn, New York.
Lasting Products Company, Baltimore, Maryland.
W. W. Lawrence Company, Pittsburgh, Pennsylvania.
Lilly Varnish Company, Indianapolis, Indiana.
Lincoln Paint & Color Co., Lincoln, Nebraska.
The Lino Paint Co., Cleveland, Ohio.
Chas. R. Long, Jr. Company, Louisville, Kentucky.
The Lowe Bros. Co., Dayton, Ohio.
Maas & Waldstein Co., Newark, New Jersey.
Mansfield Paint Co., Mansfield, Ohio.
The Marietta Paint & Color Co., Marietta, Ohio.
Martin-Senour Company, Chicago, Illinois.
Martin Varnish Co., Chicago, Illinois.
Charles Maser Company, Lyons, Illinois.
Mileti Company, Louisville, Kentucky.
Minnesota Linseed Oil Paint Co., Minneapolis, Minnesota.
The Monroe Sander Corp., Long Island City, New York.
R. N. Nason & Co., San Francisco, California.
National Mfg. Corp., North Tonawanda, New York.
New England Lacquer Co., Providence, Rhode Island.
Newark Varnish Company, Newark, New Jersey.
A. P. Nonweiler Co., Oshkosh, Wisconsin.
Ohio Paint & Glass Company, Bellaire, Ohio.
Pacific Paint & Varnish Co., San Francisco, California.
Palmer-Price Company, Newark, New Jersey.
The Patterson-Sargent Co., Cleveland, Ohio.
Payson Varnish Co., New York, New York.
13 Peaslee-Gaulbert Paint & Varnish Co., Louisville, Kentucky.
Peninsular Paint & Varnish Co., Detroit, Michigan.
Perry-Austen Mfg. Co., Staten Island, New York.
Phelan-Faust Paint Mfg. Co., St. Louis, Missouri.
Pittsburgh Plate Glass Co., Pittsburgh, Pennsylvania.
Pontiac Varnish Company, Pontiac, Michigan.
Pratt & Lambert, Inc., Buffalo, New York.
Premier Paint & Varnish Co., Chicago, Illinois.
Processed Chem. & Coat. Corp., Brooklyn, New York.
Randolph Finishing Products Co., Carlstadt, New Jersey.
Rasmussen and Company, Portland, Oregon.
Rinshed-Mason Company, Detroit, Michigan.

Manufacturing Concerns, Location

The Rockford Varnish Co., Rockford, Illinois.
Rogers Paint Products, Inc., Detroit, Michigan.
Royal Lacquer Co., Brooklyn, New York.
Sta-Rite Lacquer Corp, Brooklyn, New York.
The Schaefer Varnish Company, Louisville, Kentucky.
Schreiber Paint and Glass Co., Detroit, Michigan.
Seattle Company, Seattle, Washington.
Sewall Paint & Varnish Co., Kansas City, Missouri.
Sheboygan Paint Company, Sheboygan, Michigan.
Sherwin-Williams Co., Cleveland, Ohio.
Sillers Paint & Varnish Co., Inc., Los Angeles, California.
Skinner Paint & Varnish Co., Galesburg, Illinois.
Smith-Davis Paint Co., Los Angeles, California.
Sound Paint Manufacturing Co., Seattle, Washington.
The Speed-O-Lac Prod. Co., St. Paul, Minnesota.
The Gilbert Spruance Co., Philadelphia, Pennsylvania.
Standard Paint & Varnish Co., Windsor, Ontario, Canada.
Standard Varnish Works, Staten Island, New York.
Stanley Chemical Company, East Berlin, Connecticut.
14 John A. Steen Varnish Co., Chicago, Illinois.
Sterling Lacquer Mfg. Co., St. Louis, Missouri.
Stewart Brothers Paint Co., Alliance, Ohio.
Strathmore Products, Stockholm, Sweden.
Sullivan Varnish Co., Chicago, Illinois.
Sun Chemical Company, New York, New York.
Taunton Coating Mills, Inc., Taunton, Massachusetts.
Toch Brothers, Inc., Staten Island, New York.
Tomlinson Paint & Varnish Co., Chicago, Illinois.
Tousey Varnish Company, Chicago, Illinois.
Thresher Varnish Company, Dayton, Ohio.
Triangle Paint Company, Berkeley, California.
True Tagg Paint Co., Memphis, Tennessee.
Unifilm Paint Products Co., Somerville, New Jersey.
Union Chemical Company, Newark, New Jersey.
United Finish Company, Peabody, Massachusetts.
United Lacquer Mfg. Corp., Linden, New Jersey.
Universal Paint & Varnish Co., Cleveland, Ohio.
V.E.P. Company, Detroit, Michigan.
Vita-Var Corporation, Newark, New Jersey.
The Voltax Co., Inc., Bridgeport, Connecticut.
Wabash Products Co., Terre Haute, Indiana.
Wadsworth Howland & Co., Boston, Massachusetts.
Waggener Paint Company, North Kansas City, Missouri.
Wagner Brothers, San Francisco, California.
The H. V. Walker Company, Elizabeth, New Jersey.

Manufacturing Concerns, Location

Watson Paint and Glass Co., McKeesport, Pennsylvania.
Watson-Standard Company, Pittsburgh, Pennsylvania.
Western States Lacquer Corp., Los Angeles, California.
Geo. D. Wetherill & Co., Inc., Philadelphia, Pennsylvania.
The Williams-Hayward Var. Co., Summit, Illinois.
Wisconsin Paint Mfg. Co., Milwaukee, Wisconsin.
The Wyandotte Paint Products Co., Wyandotte, Michigan.
Yarnall Paint Co., Philadelphia, Pennsylvania.

15. "EXHIBIT B" TO COMPLAINT

MANUFACTURERS SPECIFIED ON PARAGRAPH 10 OF THE FOREGOING CONTRACT

It is understood that this list will be construed to include, in addition to the names recited herein, any associated, affiliated or subsidiary companies of the following manufacturers:

Armitage Varnish Company.
Sherwin Williams Company and associated companies.
Rinshed Mason Company.
Ferbert Schorndorfer Company.
Columbus Varnish Company.
Glidden Company.
Standard Varnish Company.
Lilly Varnish Company.
Cincinnati Varnish Company and associated companies.
Advance Paint Company.
Ault & Wiberg Company.
Murphy Varnish and associated companies.
Berry Brothers.
Hilo Varnish Corporation.
Boston Varnish Company.
Flood & Conklin and associated companies.
Jones-Dabney Company.
Forbes Varnish Company.
Kay & Ess Company.

Schedule "D".

EXHIBIT "C" TO COMPLAINT [illegible]

License Agreement

Exhibit "C" to complaint

This PATENT LICENSE AGREEMENT by and between NEW WRINKLE, INC., a corporation of the state of Delaware, with its principal office and place of business at Dayton, Ohio, hereinafter called the "Licensor"; and THE [redacted] a corporation of the state of [redacted], with its principal office and place of business at [redacted], hereinafter known as the "Licensee";

Witnesseth:

WHEREAS, the Licensor is the owner of the patents listed on the attached Exhibit "1";

AND WHEREAS, the Licensee is desirous of acquiring a license thereunder;

NOW THEREFORE, in consideration of One [1] Dollar and other good and valuable considerations, the receipt of which is hereby acknowledged, the parties agree as follows:

1. Upon the terms and conditions herein set forth, Licensor hereby grants to the Licensee a non-exclusive, personal and indivisible license in and for the United States of America and Dominion of Canada, to make use and sell the subject matter of the patents shown on the attached Exhibit "1", and of such other patents relating to the irregular finish known in the trade as "Wrinkle Finish" [also known as "Crinkle", "Shrivel", "Sag", "Morocco", and by other designations] as Licensor may now or hereafter during the existence of this license own or acquire for all purposes and uses except, however, for use with fabric of woven cloth or of felt or paper as to which no license is granted hereby]. Licensee shall also be entitled, upon the terms herein set forth, to a sublicense under any United States and Canadian "Wrinkle Finish" patents as to which Licensor now has or later acquires the right to grant sublicenses, such sublicense also, however, to be subject to such other and further terms and conditions upon which Licensor's right to grant sublicenses is acquired.

2. The Licensee hereby agrees to accept said license and to pay therefor a royalty of five [5] cents per gallon of wrinkle finish composition sold or used by it during the term of this agreement.

3. The Licensee agrees to pay said royalty between the first and twentieth day of each month for the gallons sold during the preceding month embodying the patented subject matter of this contract. This remittance shall be accompanied by a statement of the number of gallons sold, and books of account shall be kept open to inspection during reasonable business hours by the Licensor or its duly authorized representative, but the inspection of said books of account may, at the option of the Licensee, be by a certified public accountant under instructions not to reveal anything about the confidential business or names of customers of the Licensee.

4. The Licensee shall mark all of its advertising, containers, etc., with suitable statutory patent notices as may be specified from time to time by the Licensor, and with the statement "licensed by New-Wrinkle, Inc."

5. The term of this contract shall be ten [10] years, but may be extended for further periods from time to time upon written notice from Licensee to Licensor, given at least two months before the date when the License would otherwise terminate. Licensee may, however, terminate this license at any time upon three months written notice to Licensor. In case Licensee fails at any time to pay royalties, render statements or give access to its books and records as above provided, or otherwise violate or fail to observe the terms, conditions or covenants hereof, Licensor may terminate this license by written notice to Licensee to that effect provided Licensor has first given Licensee written notice of its violation or default and Licensee has failed for [30] days to remedy the same.

6. The Licensee hereby acknowledges the validity of the patents set forth on Exhibit "1" and agrees not to directly or indirectly contest the validity thereof during the life of this contract.

13

7. The Licensor hereby reserves and shall have the right at any time [illegible] Minimum Prices, Discounts, and Selling Terms only in accordance with which Licensee, Licensor, and all other Licensees shall thereafter sell or otherwise dispose of products covered by patents included herein, and thereafter to modify, amend and suspend any such Schedule and/or establish a New Schedule. No such original Schedule or any modification, amendment or suspension of a Schedule or any New Schedule shall go into effect until thirty [30] days notice in writing has been given to Licensee. The Licensee may by written notice to Licensor, but only if given within such thirty [30] day period, elect to cancel this contract, and if it does so, then said contract shall stand cancelled without any commitment or obligation by either party by reason of having entered into this contract. The Licensor announces as a matter of policy that it will fix said price based upon the cost of raw materials and labor as reported by the United States Department of Commerce and the United States Department of Labor, plus the royalty charged hereunder, it being the intent and purpose of the Licensor to open to the entire trade the use of these patents so licensed at the lowest price consistent with a reasonable profit to the manufacturer, Licensee, the trade, and to this Licensor. No Schedule of Minimum Prices, Discounts and Selling Terms nor any modification or amendment or suspension thereof shall be binding upon Licensee unless at the same time and in the same terms imposed upon Licensor and all other Licensees.

8. In the event that any subsequent license is granted with lower terms of royalty, said lower terms shall apply to the Licensee hereunder.

9. All previous agreements between the Licensee, with respect to any of the patents covered hereby, with Licensor's predecessors in title to such patents are hereby cancelled and terminated and Licensee is hereby relieved of any obligations under or in connection with any such previous agreements as to matters accruing hereafter.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate by their officers thereunto duly authorized and to be sealed with their corporate seals as of the day and year below written.

NEW WRINKLE, INC.

Witnesses:

M. L. Williamson

Dorothy P. Parkman

By H. Strudget
President

Attest M. L. Williamson
Ass't Secretary

10th day of February, 1938.

Signed at Dayton, Ohio

[redacted] COMPANY

Witnesses:

Doris M. Otte

Robert E. Stewart

By [redacted]
Vice-President

Attest F. J. Sheeran
Ass't Secretary

Copy No. 2

Contract No. 5

8th day of February, 1938

Signed at Phila.

EXHIBIT "1"

PATENTS OWNED BY NEW WRINKLE, Inc.

UNITED STATES PATENTS

1,689,892	Root	Oct. 30, 1928
1,732,661	Root	Oct. 22, 1929
1,831,323	Root	Nov. 10, 1931
1,864,763	Root	June 28, 1932
1,878,316	Phillippi	Sept. 20, 1932
1,883,408	Root	Oct. 18, 1932
1,896,594	Root	Feb. 7, 1933
1,936,913	Phillippi	Nov. 28, 1933
1,976,191	Root	Oct. 9, 1934
2,037,331	Kittredge et al	April 14, 1936
2,069,252	Kittredge et al	Feb. 2, 1937
2,077,112	Kittredge et al	April 13, 1937
Des. 88,001	Root	Oct. 19, 1932

CANADIAN PATENTS OWNED BY NEW WRINKLE, INC.

311,503	Root	May 19, 1931
311,504	Root	May 19, 1931

[redacted]

Exhibit "D" to complaint

NEW WRINKLE LICENSE RULINGS

FIFTH EDITION

(Superseding all Previous Editions)

PUBLISHED

June 1, 1947

To Our Licensees:

These rulings are issued for the information and guidance of all concerned. Distribution is being effected so that all licensees will be fully informed as to our existing rulings.

NEW WRINKLE, INC.
137 N. PERRY ST.
DAYTON 2, OHIO

U. S. Patents

1,689,892 — 1,722,941 — 1,831,323 — 1,864,762 — 1,878,316 — 1,883,498 — 1,893,611 — 1,896,394 — 1,936,913
1,950,417 — 1,960,164 — 1,976,191 — 1,980,309 — 1,991,527 — 1,994,529 — 2,037,331 — 2,049,252 — 2,077,112
2,126,703 — 2,154,954 — 2,236,397 — 2,236,398 — 2,268,002 — 2,268,912 — 2,268,922 — 2,275,239 — 2,283,420
2,294,702 — 2,309,595 — 2,319,022 — 2,320,513 — 2,344,189 — 2,344,807 — 2,347,303 — 2,347,304 — 2,373,177
2,373,211 — 2,373,212 — 2,381,853 — 2,387,424 — 2,389,794 — 2,389,795 — 2,392,348 — 2,394,498 — 2,394,499
2,394,500 — 2,396,389 — 2,396,361 — 2,407,823 — Design 88,001

Other patents pending

Canadian Patents: 311,503 — 311,504 — 407,866 — 410,406 — 410,407 — 412,813 — 412,814 — 412,815 — 412,816 414,922 — 415,845

NEW WRINKLE, Inc.

Licensors of Processes and Finishes

Violations

Any violations will be promptly investigated. To do this effectively, it is necessary that the facts as to names of seller and buyer, dates, products, prices, terms, etc. all be stated with considerable fullness. We cannot take action on hearsay information. Licensees will assist themselves and us by prompt reports of violations and by making these reports full and complete.

Sale of Other Products

When a licensee endeavors to influence the sale or does infulence the sale of products covered by the minimum price schedule by selling other products at special cut prices, such action constitutes a violation of the price schedule. Likewise the granting of unauthorized discounts or rebates, the placing of stocks on consignment, etc. constitute violation and will render the license subject to cancellation.

Ready For Use

The minimum price schedule and the contract carefully specify that the intent and purpose of the price schedule and license contract is to insure that all licensees sell at not less than the minimum price established so as to insure uniform and fair treatment for all licensees. It is contemplated that these finishes are to be sold in their ready to use condition without further cutting and the prices are established accordingly.

It is, therefore, established by the Licensor that 67.5% of solids by weight is fixed as the maximum solid content of all enamels ready for use except those enamels containing organic reds and maroons; and 55% of solids by weight is fixed for all enamels containing organic reds and maroons.

Supplier shall make the following determination at 60°F.: If Wrinkle Finish requires more than 10% reduction at this temperature for normal spray gun application it shall be regarded as a "concentrated material" and not "a ready for use" material and the minimum price of such "concentrated material" shall be One ($1.00) Dollar per gallon more that the established schedule of prices.

Licensees are advised that if they supply copcentrate assuming that the customer will "cut" the concentrate, the royalty payment must be based on the ultimate gallonage, after being "cut" by the customer. The responsibility will be that of the licensee. Selling concentrate is most unusual. The licensee will be held under the strictest obligation to give a report of it, name and place and price so made to the customer, specifying the customer and all data of the transaction. The licensor warns against this practice as injurious to the public, the licensee and the licensor because of the difficulty of control of the quantity of the product if the product should be completed ready for use by the customer instead of in the licensee's own plant.

Clear Wrinkle Converted by Customer into Color Enamel

This practice is very injurious to the customer and to the licensee. We warn against the practice.

The licensee manufacturer, when quoting on clear Wrinkle Finishes, must stipulate that this clear Wrinkle is sold only on the price quoted for use as clear Wrinkle. Any conversion into colored Wrinkle must be reported. If the customer desires to so convert, the licensee must charge the price per gallon established for Wrinkle Finish for the color in question on the basis of the gallonage that will ultimately exist after the customer adds the color. The royalty must be paid on such ultimate gallonage. The price must be charged the customer on the basis of color added by the customer.

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NEW WRINKLE, Inc.

Licensors of Processes and Finishes

Color Classification

METALLICS

Any percentage of metallic in a formulation brings it under the classification of a "metallic."

REDS

The phrase in the minimum price schedule, "Ordinary Colors" means all colors except those containing organic reds or maroons.

The phrase in the minimum price schedule, "Organics" means "reds and maroons other than those made with oxides exclusively." *Any percentage of organics in a formulation brings it under the classification of "Organic Reds."*

Licensee's Contracts With Customers

The minimum prices established under the license contract are subject to change upon thirty days notice. Written contracts may be made under the existing price schedule and future schedules for periods not exceeding three months beginning with the time that the new price schedule goes into effect.

The minimum price schedule is for the purpose of maintaining a price, below which sales of the patented compositions referred to in the license contract cannot be made without a violation of the contract agreement. The purpose of this price list is not to indicate the prices at which a sale should be made. Prices at or above the minimum price schedule will naturally vary between manufacturers because of differences in manufacturing operations, character of ingredients, variation in the formulae, uniformity and quality of the finished product, etc. We have fixed the minimum prices as those which would insure to any manufacturer a fair minimum profit and a fair price to the public, it being understood that the public would benefit from higher prices where justified by service, quality, etc.

Licensee Sales to Manufacturing Licensed Customers

One licensee may have wrinkle finish or material thereformade for it by another licensee. The Schedule of Minimum Prices will not apply to such transaction. A licensee selling such product, however, would be responsible for the royalty and for the maintenance of the schedule of minimum prices. *Licenses will be granted* only *to manufacturers,* not *to users or jobbers*

Whenever a sale is made of concentrate by one licensee to another licensee to be "cut" or have color or metallic added to clear wrinkle by the second licensee and sold in completed condition by the second licensee ready to use, then the licensee seller and the licensee purchaser must report the details of the transaction in the month following the date on which the transaction occurs; and the licensee seller or purchaser must pay the royalty on the ready to use Wrinkle as sold to the trade by the licensee purchaser and at the prices specified on the price schedule. The report must state which one is responsible for the payment of the royalty and the royalty must be paid by the one so responsible. Under such conditions, there shall be only one royalty paid on the ultimate gallons after they are made ready for use.

The report must be quite complete to enable us to do the requisite checking.

NEW WRINKLE, Inc.

Licensees of Processes and Finishes

Terms

The prices established in the price schedule are on the basis of f. o. b. destination or freight allowance.

Discounts

The discounts are 30 days net, 1% for cash within 10 days after shipment; except that the discount period may be extended to the 20th day of the month following purchases to customers who regularly discount in the month following purchase and provided no discount shall be allowed after the discount date and further provided that each of such transactions shall be reported as to the name of the customer so that any complaint by any other licensee can be checked. This is for the protection of both the licensee and the licensor.

Licensees are authorized to grant discounts, where their manufacturing savings and sales costs justify it, not exceeding the following percentages on sales to each buyer whose total purchases under written contract of Wrinkle Finishes from the licensee granting the discounts during the *twelve months period* succeeding the date of the contract, are in excess of the quantities shown below.

½% — 2,500 gallons	3% — 15,000 gallons	7% — 35,000 gallons
¾% — 3,500 gallons	4% — 20,000 gallons	8% — 40,000 gallons
1% — 5,000 gallons	5% — 25,000 gallons	9% — 45,000 gallons
2% — 10,000 gallons	6% — 30,000 gallons	10% — 50,000 gallons and over

Licensees must state to the buyer when submitting the quotations a statement as to the discounts; and this discount can only be granted when made in writing. Such discounts shall be allowed by the licensee only upon receipt by the licensee of a written statement signed by the responsible official of the buyer that the total purchases of the license finishes during the *contract* year to date have amounted to the quantities above indicated. The discounts can only be granted on completion of the deliveries under the contract. A true copy of this letter must be furnished to New Wrinkle, Inc.

Each time a licensee allows such a discount it must attach to its next royalty report such copy of a statement received from the buyer during the preceding month, with information as to number of gallons sold to each of such buyers from the beginning of the *contract* year to the end thereof and the amount of discount so granted.

This price is based upon shipments within one year from the date of the start to the completion of the shipping on the contract of each buyer. That is, the contract must be completely shipped within one year from the date of the first shipment on the contract. This arrangement does not modify the making of prices elsewhere set forth but is based on prices as they may be established from time to time.

See "Discounts from Price Quoted on Government Contracts" (Page 6) as to discounts allowable on purchases by the United States or a Governmental Agency.

Patent Notice

The statutory notice required by the contract should be applied by the licensee, and a typical short form suggestion would be:

"Licensed under New Wrinkle, Inc. Patents."

We also approve, for the protection of the licensee and the licensor, the following long notice, where it is practical to apply it:

"Licensed under New Wrinkle patent numbers:

United States: 1,629,892 — 1,732,661 — 1,831,323 — 1,864,763 — 1,878,316 — 1,882,608 — 1,888,611 — 1,896,894 — 1,936,913 — 1,960,417 — 1,960,164 — 1,976,191 — 1,980,309 — 1,991,827 — 1,992,328 — 2,037,391 — 2,060,582 — 2,077,112 — 2,124,783 — 2,154,954 — 2,236,397 — 2,236,398 — 2,265,002 — 2,269,018 — 2,269,042 — 2,275,259 — 2,283,420 — 2,294,783 — 2,308,595 — 2,319,022 — 2,320,513 — 2,344,189 — 2,344,807 — 2,347,308 — 2,347,364 — 2,373,177 — 2,373,211 — 2,373,212 — 2,381,653 — 2,387,424 — 2,389,784 — 2,389,785 — 2,392,346 — 2,394,498 — 2,394,499 — 2,394,500 — 2,395,380 — 2,395,381 — 2,407,823. Design 88,691

Canada: 311,503 — 311,504 — 407,866 — 410,406 — 410,407 — 412,813 — 412,814 — 412,815 — 412,816 — 414,602 — 415,645. Other patents pending.

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NEW WRINKLE, Inc.

Licensors of Processes and Finishes

MINIMUM PRICE SCHEDULE No. 5

(Announced June 1, 1947)
EFFECTIVE JULY 1, 1947
(Superseding Minimum Price Schedule No. 4 as revised December 12, 1946)
Part of New Wrinkle, Inc., License Agreement
Dated April 1, 1938

The following are the minimum prices at which patented Wrinkle Finish may be sold under License Agreement, to take effect on July 1, 1947 and to remain in force until further notice.

	1 Gal.	5 Gal.	½ Drum	Drum
WRINKLE FINISH CLEAR				
—100	$2.85	$2.70	$2.65	$2.60
+100	2.70	2.55	2.50	2.45
WRINKLE FINISH BLACK				
—100	2.40	2.25	2.20	2.10
+100	2.25	2.10	2.05	2.05
WRINKLE FINISH ORDINARY COLORS				
—100	2.65	2.50	2.40	2.35
+100	2.50	2.35	2.25	2.20
WRINKLE FINISH ORGANICS				(see page 8)
—100	4.00	2.85	2.75	2.70
+100	2.85	2.70	2.60	2.55
WRINKLE FINISH METALLICS				(see page 8)
(Addition of metallic to clear Wrinkle)				
—100	2.50	2.35	2.25	2.20
+100	2.35	2.20	2.10	2.05

In the event that a metallic is added to a pigmented Wrinkle Finish, the established minimum for that pigmented finish, plus $.25, will be the minimum price.

Reductions in price for quantity as shown on above schedule are permissable on and shall apply only to quantities of wrinkle finish contained in a single shipment.

Wrinkle Finish in concentrated form or ingredients from which customer may produce wrinkle finish may be sold by Licensee only at minimum price per gallon on the number of gallons of the kind or color of wrinkle finish for final use by the customer that can normally be produced by adding to such concentrate or ingredients supplied by Licensee.

Clear Wrinkle Finish sold by Licensee under circumstances charging seller with knowledge that customer intends converting same into colored wrinkle finish may be sold only in accordance with the minimum price per gallon hereby established for wrinkle finish of the color and quantity in question.

Prices are f. o. b. destination or freight allowed.

In the event of cancellation of orders or return of goods prices shall be readjusted and settlement made according to the actual quantities purchased and retained.

Terms: 30 days net, 1% for cash within ten days after shipment.

In making bids, it is not permissable to deduct the cash discount. The cash discount of 1% can only be given or allowed if the "Wrinkle Finish" is actually paid for within ten days after shipment.

See minimum Price Schedule (No. 2-A) on Page 7 for Canadian Prices.

RULINGS JULY 1, 1938 TO JULY 1, 1947

Extended Deliveries

Quotations to Federal, State and Municipal Governments and Governmental Agencies may be based on deliveries to extend to the end of the fiscal period for which bids were invited.

Discounts from Price Quoted on Governmental Contracts

While the minimum price schedules apply on all quotations and sales to the United States, a state or municipality, or any agency thereof, the quantity discounts shown on Page 4 may be allowed on the **total gallonage** *so quoted or sold regardless of the period of such a contract or the number of gallons in individual shipments thereunder. Such discounts may be granted at the time of billing the shipments.*

Minimum Prices Applicable to Shipments Comprising More Than One Color

Where a shipment consists of more than one color, minimum prices (as given in Minimum Price Schedule No. 5 and 2-A) for the quantities of each color will apply. *It is not permissable to group several colors in one shipment and base the price on the total combined gallonage.*

Minimum Prices and Royalties Applying to Canada

Minimum Price Schedule (No. 2-A) on Page 7, covers minimum prices per Imperial gallon at which patented Wrinkle Finish may be sold in Canada. On such business the rate of royalty is Six (6c) Cents per Imperial gallon.

Metallics and Organic Reds

Particular attention is invited to "Color Classification" on Page 3 herein.

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NEW WRINKLE, Inc.

Licensors of Processes and Finishes

CANADIAN MINIMUM PRICE SCHEDULE (No. 2-A)

(Announced November 12, 1946)
EFFECTIVE DECEMBER 12, 1946
Part of New Wrinkle, Inc., License Agreement
Dated April 1, 1938

The following are the minimum prices at which patented Wrinkle Finish may be sold under License Agreement, effective October 11, 1939, and to remain in force until further notice. (Prices are based on Imperial Gallons).

Wrinkle Finish Clear

In 1 gallon cans, less then 100 gallons in single delivery	$3.44
In 5 gallon cans, less than 100 gallons in single delivery	3.25
In half-drums (approx. 30 gallons) less than 100 gallons in single delivery	3.19
In full drums (50-55 gallons), less than 100 gallons in single delivery	3.06
In 1 gallon cans, 100 or more gallons in single delivery	3.25
In 5 gallon cans, 100 or more gallons in single delivery	3.06
In half-drums, 100 or more gallons in single delivery	3.00
In full drums, 100 or more gallons in single delivery	3.07

Wrinkle Finish Colored

Wrinkle Finish in black and colors are to be sold at not less than base miminum price for clear wrinkle with following additions in price to-wit:

Blacks	add 20c per gallon
Ordinary colors and oxide reds	" 50c " "
Organic Reds (See Page 3)	" 95c " "

Wrinkle Finishes containing **metallics** *are to be sold at not less than the base minimum price for clear wrinkle, plus the above specified addition for a particular color,* **plus** *a further charge of* 35c *per gallon.*

Reductions in price for quantity as shown on above schedule are permissable on and shall apply only to quantities of wrinkle finish contained in a single shipment.

Wrinkle Finish in concentrated form or ingredients from which customer may produce wrinkle finish may be sold by Licensee only at minimum price per gallon on the number of gallons of the kind or color of Wrinkle finish for final use by the customer that can normally be produced by adding to such concentrate or ingredients supplied by Licensee.

Clear Wrinkle Finish sold by Licensee under circumstances charging seller with knowledge that customer intends converting same into colored wrinkle finish may be sold only in accordance with the minimum price per gallon hereby established for wrinkle finish of the color and quantity in question.

Prices are f. o. b. destination or freight allowed.

In the event of cancellation of orders or return of goods prices shall be readjusted and settlement made according to the actual quantities purchased and retained.

Terms: 30 days net 1% for cash within ten days after shipment.

In making bids, it is not permissable to deduct the cash discount. The cash discount of 1% can only be given or allowed if the "Wrinkle Finish" is actually paid for within ten days after shipment.

NEW WRINKLE, INC.

PATENTS

United States: 1,689,892 — 1,732,661 — 1,831,323 — 1,864,763 — 1,878,316
1,883,408 — 1,893,611 — 1,896,594 — 1,936,913 — 1,950,417
1,969,164 — 1,976,191 — 1,980,309 — 1,991,527 — 1,991,528
2,037,331 — 2,069,252 — 2,077,112 — 2,124,703 — 2,154,954
2,236,397 — 2,236,398 — 2,268,002 — 2,268,012 — 2,268,022
2,275,239 — 2,283,420 — 2,294,703 — 2,308,595 — 2,319,022
2,320,513 — 2,344,189 — 2,344,807 — 2,347,303 — 2,347,304
2,373,177 — 2,373,211 — 2,373,212 — 2,381,653 — 2,387,424
2,389,794 — 2,389,795 — 2,392,346 — 2,394,498 — 2,394,109
2,394,500 — 2,395,360 — 2,395,361 — 2,407,623

Design 88,001

Canada: 311,503 — 311,504 — 407,866 — 410,406 — 410,407 — 412,613
412,614 — 412, 615 — 412,616 — 414,932 — 415,645

Other Patents Pending

27 [File endorsement omitted]

In United States District Court

[Title omitted]

MOTION TO DISMISS—Filed October 11, 1948

Now comes the defendant, New Wrinkle, Inc., specially appearing by its counsel for the sole purpose of contesting the jurisdiction of this Court in the above entitled action, and moves this Honorable Court for an order dismissing the Complaint herein on the ground that:

In view of the averments in paragraph I (2), and the averments in paragraph III (11) first sentence of the Complaint that "New Wrinkle has not engaged in the commercial manufacture and sale of Wrinkle finishes at any time since its incorporation in 1927," it is plain that it has not engaged in interstate commerce and therefore could not be guilty of violation of Section 1 of the Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

I

The Anti-Trust Statute is based upon interstate commerce only:

Apex Hosiery Company v. *Leader*, 310 U.S. 469;
Atlantic Cleaners & Dyers v. *United States*, 286 U. S. 427;
Anderson v. *United States*, 171 U. S. 604.

Interstate commerce "is an intensely practical concept drawn from the normal and accepted course of business."

United States v. *Yellow Cab Co.*, 332 U.S. 218 (citing *Swift & Co.* v. *United States*, 196 U.S. 375, 398; *North American Co.* v. *S.E.C.*, 327 U. S. 686).

"The Sherman Act was enacted under authority of the commerce clause and is necessarily of no greater dignity than that clause."

Washington Brewers Institute v. *United States* (CCA 9), 137 F. (2d) 965, 967.

II

(a) Merely licensing under the Patent law is not engaging in commerce—mere legal right to enjoy the statute is a matter of law and not a matter of commerce;

"It is true that the mere making of the lease of the machines is not of itself interstate commerce."

United Shoe Mach. Co. v. *United States*, 258 U.S. 451, 465;
Ware & Lelan v. *Mobile County*, 209 U.S. 405, 411-14;
Western Live Stock v. *Bureau of Revenue*, 303 U.S. 250, 253;
Hill v. *Wallace*, 259 U.S. 44, 69;
29 *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 32-3;
Moore v. *New York Cotton Exchange*, 270 U.S. 593, 604;
Hopkins v. *United States*, 171 U.S. 578, 588-9, 602.

(b) A matter of law cannot be a matter of commerce;

"The question for the courts, however, is not economic, but wholly legal, to wit, the true interpretation of the law as enacted by Congress."

Paramount Pictures v. *United Motion Pictures T.O.* (CCA 3), 93 F. (2d) 714;
Industrial Association of San Francisco v. *United States*, 268 U.S. 64;
Levering & Garrigues Co. v. *Morrin*, 289 U.S. 103;
United Leather Workers v. *Herkert & Meisel Trunk Co.*, 265 U.S. 457;
Local 167 v. *United States*, 291 U.S. 293;
United States v. *Hutcheson*, 312 U.S. 219;
Associated Press v. *Labor Board*, 301 U.S. 103.

(c) Manufacturing and selling or entering into commercial activities may be commerce, but a patent license under the law does not constitute doing business. They may relate to things or events in other states than that of their execution but they do not contain any obligation to engage in any form of interstate commerce;

Ware & Leland v. *Mobile County*, 209 U.S. 405;
Western Live Stock v. *Bureau of Revenue*, 303 U.S. 250.

30 (d) Any dealings between The Kay & Ess Company and New Wrinkle were in the State of Ohio and were not interstate commerce.

Hopkins v. *United States*, 171 U.S. 578;
United States v. *Hutchinson*, 312 U.S. 219;
Atlantic Cleaners & Dyers v. *United States*, 286 U.S. 427.

(e) These contracts of license do not cause any movement of goods or affect the sale of goods as between the licensor and licensee. The act of making any contract which does not stipulate for the performance of an act or transaction of interstate commerce is not in

itself interstate commerce. This has been held to be true even though the contract be effected by exchange of communication across state lines;

New York Life Ins. Co. v. *Cravens*, 178 U.S. 389;
Ware & Leland v. *Mobile County*, 209 U.S. 405;
New York Life Ins. Co. v. *Deer Lodge County*, 231 U.S. 495.

"The mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce."

Jewel Tea Co. v. *Williams* (CCA 10), 118 F. (2d) 203, citing *Lipson* v. *Socony Vacuum Corporation* (CCA 1), 87 F. (2d) 265; *Moore* v. *New York Cotton Exchange*, 270 U.S. 593; *Ware & Leland* v. *Mobile County*, 209 U.S. 405; *Schechter Corp.* v. *U. S.*, 295 U. S. 495.

31 Conclusion

In view of the foregoing, it is obvious that the Plaintiff has misconceived its action and has selected the wrong defendant in New Wrinkle, Inc.

TOULMIN & TOULMIN,
By (S.) H. T. TOULMIN, JR.,
308 West 1st St.,
Dayton 2, Ohio,
Attorneys for the defendant, New Wrinkle, Inc., specially appearing for the sole purpose of contesting the jurisdiction of this Court and for no other purpose.

32 [File endorsement omitted]

In United States District Court

[Title omitted]

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM—Filed October 8, 1948

Defendant, The Kay and Ess Company, moves the Court to dismiss this action because the Complaint fails to state a claim against defendants, upon which relief can be granted in that the license of the right to manufacture and sell a patented article, where reasonable conditions limiting the price to be obtained by the licensee are incorporated in such license, does not constitute restraint of commerce forbidden by the Sherman Act, as amended,

Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, 15 USCA section 1 et seq.

(S.) HUBERT A. ESTABROOK
(ESTABROOK, FINN & McKEE)
9th floor, Mutual Home Bldg.
Dayton 2, Ohio
Attorney for Defendant,
THE KAY AND ESS COMPANY.

33 MEMORANDUM

Once having put a patented product into the channels of commerce, a patentee may not thereafter control the price which is to be obtained on resale of said product. *Ethyl Gasoline Corporation* v. *United States of America*, 309 U.S. 436, 60 S. Ct. 618, 84 Led. 852 (1940).

Where, however, the patentee does not sell his patented product, but merely grants licenses the right to manufacture and sell the product, the patentee may impose conditions restricting the terms upon which the product manufactured under such license may be used, and the price to be demanded therefor, and such conditions do not constitute a restraint on commerce forbidden by the Federal Anti-Trust Act. *E. Bement & Sons* v. *National Harrow Company*, 186 U.S. 70, 22 S. Ct. 747, 46 L. ed., 1058 (1902); *United States of America* v. *General Electric Company*, 272 U.S. 476, 47 S. Ct. 192, 71 L. ed. 362 (1926).

See also 7 A.L.R. 478, Also see 40 Am. Jur. Patents, Section 144 at page 632.

Respectfully submitted,

(S.) HUBERT A. ESTABROOK,
(ESTABROOK, FINN & McKEE)

34 In the United States District Court

[Title omitted]

ORDER

This cause now coming on for hearing on the motion of defendant, The Kay & Ess Company, for an order transferring this case from the Eastern Division of the Southern District of Ohio to the Western Division of the Southern District of Ohio, the Court, on consideration thereof, grants the same, and orders that this case and all matters pending herein, be transferred to the Western Division of the Southern District of Ohio, at Dayton, Ohio.

IT IS FURTHER ORDERED that the Clerk of this Court transmit to the Clerk of the United States District Court for the Southern

District of Ohio, Western Division, at Dayton, Ohio, for docketing on his docket all of the papers and proceedings filed herein.

(S.) UNDERWOOD,
United States District Judge.

(S.) HERBERT A. BERGSON,
(S.) LOREN G. WINDOM,
Asst. U.S. Attorney,
Attorneys for Plaintiff.

——— ———,

35 *Attorneys for Defendant,*
NEW WRINKLE, INC.

HUBERT A. ESTABROOK,
Attorneys for Defendant,
THE KAY & ESS COMPANY.

36 United States District Court, Southern District of Ohio, Western Division

Civil No. 1006

(At Dayton)

(Columbus No. 2276)

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

NEW WRINKLE, INC., and THE KAY & ESS COMPANY, *Defendants*

ORDER—Filed June 5, 1951

This cause coming on to be heard on the motion to dismiss heretofore, to-wit, on October 11, 1948, filed by and on behalf of the defendant, New Wrinkle, Inc., upon the grounds and for the reasons as in said motion set forth, the Court, upon consideration whereof, together with the Complaint, the briefs of counsel and the oral arguments of counsel on February 14, 1949 (Transcript filed July 21, 1949) is of the opinion and so finds that the motion to dismiss is well taken and that it should be sustained.

IT IS THEREFORE, BY THE COURT ORDERED, ADJUDGED AND DECREED that the motion hereinabove referred to of defendant New Wrinkle, Inc., be and hereby it is, sustained, and the Complaint is dismissed, without costs to defendant, New Wrinkle, Inc.

To all of which findings, rulings, orders, judgments and decrees of the court, plaintiff excepts.

(S.) ROBERT R. NEVIN,
Chief Judge, U. S. District Court, S.D.O.

37 United States District Court, Southern District of Ohio, Western Division

Civil No. 1006

(At Dayton)

(Columbus No. 2276)

UNITED STATES OF AMERICA, *Plaintiff*

v.

NEW WRINKLE, INC., AND THE KAY & ESS COMPANY, *Defendants*

ORDER—Filed June 5, 1951

This cause coming on to be heard on the motion to dismiss heretofore, to-wit, on October 8, 1948, filed by and on behalf of defendant The Kay & Ess Company, wherein the defendant moves the court to dismiss this action upon the grounds and for the reasons as in said motion set forth, the Court, upon consideration whereof, together with the Complaint, the briefs of counsel and the oral arguments on February 14, 1949 (Transcript filed July 21, 1949) is of the opinion and so finds that the motion is well taken and should be sustained.

It is, therefore, by the court ordered, adjudged and decreed that the motion hereinabove referred to of the defendant The Kay & Ess Company, to dismiss this action as against it be, and hereby it is, sustained, and the Complaint is dismissed without costs to this defendant, The Kay & Ess Company. To all of which rulings, findings, orders, judgments and decrees of the court, plaintiff excepts.

(S.) ROBERT R. NEVIN,
Chief Judge, U. S. District Court, S.D.O.

38 [File endorsement omitted]

In the United States District Court

[Title omitted]

PETITION FOR APPEAL—Filed July 24, 1951

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final judgments of the Court entered on June 5, 1951, prays that an appeal be allowed from said final judgments to the Supreme Court of the United States; that citation be issued in accordance with law, and that the material parts of the record, proceedings, and papers upon which said final judg-

ments were based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules of said Court in such cases made and provided.

(S.) NEWELL A. CLAPP,
Acting Assistant Attorney General.
(S.) ROBERT B. HUMMELL,
Special Assistant to the Attorney General.

39 [File endorsement omitted]

In the United States District Court

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 24, 1951

The United States of America having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final judgments of the Court in this cause entered on June 5, 1951, and having presented its petition for appeal, assignment of errors and prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is ordered that said appeal be and the same hereby is allowed as prayed for.

It is further ordered that citation shall issue in accordance with law.

(S.) ROBERT R. NEVIN,
United States District Judge.

40 CITATION ON APPEAL—(Omitted in printing)

41 [File endorsement omitted]

In the United States District Court

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed July 24, 1951

The United States of America, plaintiff in the above entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which it will rely in its prosecution of said appeal from the final judgments of the District Court entered on June 5, 1951.

The District Court erred in:

1. Granting defendants' motions to dismiss the complaint.

2. Finding that defendants' motions to dismiss were well taken and should be sustained.

3. Entering judgments dismissing the complaint.

Wherefore, plaintiff prays that the final decrees of the District Court be reversed, and for such other relief as the Court may deem fit and proper.

(S.) NEWELL A. CLAPP,
Acting Assistant Attorney General.
(S.) ROBERT B. HUMMEL,
Special Assistant to the Attorney General.

42-43 STATEMENT REQUIRED BY PARAGRAPH 2 RULE 12 (Omitted in printing)

44 PRAECIPE FOR RECORD (omitted in printing)

45-47 AFFIDAVIT OF SERVICE OF MOTION TO DISMISS APPEAL (omitted in printing)

48 DEFENDANTS' PRAECIPE FOR RECORD (omitted in printing)

49 Clerk's Certificate to foregoing transcript omitted in printing.

50 [File endorsement omitted]

In the Supreme Court of the United States, October Term, 1951

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed August 28, 1951

a. Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

b. Appellant designates the entire record, as filed in the above-entitled case, for printing by the Clerk of this Court.

/s/ PHILIP B. PERLMAN,
Solicitor General.

51 PROOF OF SERVICE (omitted in printing)

No. 250

[Title omitted]

ORDER—October 8, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Clark took no part in the consideration or decision of this question.

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